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THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission resolution 2001/3

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Executive Summary

The report outlines the Special Rapporteur's activities in 2001, commenting on the first meeting of experts on mercenary activities, held in January. The Special Rapporteur has received invitations from the Governments of El Salvador and Panama to conduct official missions to those countries in 2002 in connection with transit through those countries of mercenaries taking part in terrorist attacks against Cuba. There follows an analysis of terrorist activities over the reporting period, with special consideration of the situation in Africa. The Special Rapporteur reviews the conflicts in Angola, the Democratic Republic of the Congo and Sierra Leone, and considers the presence of mercenaries in those conflicts and the trafficking that takes place to finance them, in particular trafficking in diamonds and other precious stones. The Special Rapporteur encourages initiatives to combat illegal trafficking in diamonds and other gems in which mercenaries are involved, in particular the initiative undertaken by the Government of South Africa and various non-governmental organizations.

The Special Rapporteur continues his consideration of the relationship between terrorism and mercenary activities. The terrorist attacks of 11 September 2001 in New York, Washington DC and Pennsylvania reflect a high degree of preparation and logistical organization, and the possibility that the perpetrators resorted to the hiring of mercenaries for some of the preparations if not final execution, cannot, a priori, be excluded. It is also hard to believe that all those that took part in the act or the preparations acted solely on ideological, political or religious grounds, since some may have taken part for pay or have been motivated by financial considerations or the promise of material compensation. The Special Rapporteur regrets the lack of response to his requests for investigation of the financial networks and havens used to fund trafficking and acts of terrorism and mercenary activities.

Lastly, the Special Rapporteur welcomes the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted on 4 December 1989, and trusts that more States will ratify it and accede to it. He stresses the need to arrive at a clearer, more functional and comprehensive definition of the term mercenary, and requests the second meeting of experts, to be held in 2002, to take up this question.

Introduction

1. The Commission on Human Rights, in its resolution 2001/3, decided to consider at its fifty-eighth session the question of the use of mercenaries as a means of violating human rights and of impeding the exercise of the right of peoples to self-determination, and, in accordance with General Assembly resolution 55/86, to renew the mandate of the Special Rapporteur for a period of three years. The decision was endorsed by the Economic and Social Council in its decision 2001/244. The General Assembly, in its resolution 56/232, welcomed the report of the Special Rapporteur (A/56/224), requested the Special Rapporteur to continue taking into account in the discharge of his mandate the fact that mercenary activities were continuing to occur in many parts of the world and were taking on new forms, manifestations and modalities, and to report, with specific recommendations, to the General Assembly at its fifty-seventh session his findings on the use of mercenaries to undermine the right of peoples to self-determination.

2. For the above reasons, and further to Commission resolution 2001/3, the Special Rapporteur has the honour to submit this report to the Commission on Human Rights for its consideration at its fifty-eighth session.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Programme of activities

3. The Special Rapporteur submitted his report to the Commission on Human Rights on 22 March 2001. The Special Rapporteur returned to Geneva on three occasions, from 21 to 25 May 2001, from 9 to 12 July 2001 and from 3 to 7 December 2001, to hold consultations with representatives of States, meet members of non-governmental organizations and draft his reports to the General Assembly and the Commission on Human Rights. While in Geneva the Special Rapporteur held working meetings with the Thematic Mechanisms section of the Activities and Programmes Branch of the Office of the United Nations High Commissioner for Human Rights.

4. The Special Rapporteur introduced his report before the Third Committee of the General Assembly on 31 October 2001. While in New York he met representatives of States and non-governmental organizations headquartered in New York and held working meetings with officials in the Office of the High Commissioner for Human Rights at Headquarters.

5. The Special Rapporteur has been invited by the Governments of the Republics of El Salvador and Panama to visit those countries in the context of investigations into terrorist activities against Cuba by mercenaries transiting their territory. The Special Rapporteur welcomes the invitations, which he sees as an indication of willingness to cooperate with his mandate, and expects to make the visits in May 2002.

B. Correspondence

6. Pursuant to General Assembly resolution 55/86 and resolution 2001/3 of the Commission on Human Rights, on 16 June the Special Rapporteur sent a communication to all States Members of the Organization, requesting:

(a) Information on the possible existence of any recent mercenary activities (recruitment, financing, training, assembly, transit or use of mercenaries);

(b) Participation by nationals of their country as mercenaries in the commission of acts against the sovereignty of other States, the exercise of self-determination by other peoples and the enjoyment of human rights;

(c) Information on the possible existence of mercenary activities in the territory of another State against the respondent State;

(d) Information on the possible participation of mercenaries in the commission of internationally wrongful acts, such as terrorist attacks, formation of and support for death squads and paramilitary organizations, abduction of and trafficking in persons, and trafficking in drugs or weapons and contraband;

(e) Information on domestic legislation in force and on treaties outlawing mercenary activities to which the State is a party;

(f) Suggestions for enhancing the international treatment of the topic, including proposals for a clearer definition of mercenaries; and, lastly,

(g) Information and views on private security service and military consultancy and training companies.

7. The replies given by the Governments of the Republics of Cuba and of Maldives are contained in paragraphs 24 to 26 of the report of the Special Rapporteur to the General Assembly at its fifty-sixth session.

8. In a note verbale dated 11 July 2001, the Permanent Mission of Kuwait to the United Nations Office at Geneva submitted the following reply:

> "The Kuwaiti authorities primarily wish to affirm in connection with this matter that Kuwait continues to maintain the same firm standpoints which it is seen to demonstrate in all international and regional forums in condemning the use of mercenaries as a flagrant violation of the principles on which relations among States and peoples are based, of human rights principles and of the noble values so firmly rooted in the human conscience;
>
> "Kuwait has no proposals to make in regard to the question of the definition of mercenaries, as it is unable to add any new elements to the definition contained in Additional Protocol I to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts, which it considers to be adequate. Kuwait is bound by that definition, particularly since Protocol I became part of Kuwaiti national legislation following Kuwait's accession thereto. It is well known that, in addition to the definition of a mercenary, article 47 of the said Protocol provides that a mercenary shall not have the right to be considered a combatant or a prisoner of war. Nor is he entitled to benefit from the ensuing legal effects."

9. In an earlier note verbale dated 12 August 1999, the Permanent Mission of Kuwait to the United Nations Office at Geneva stated:

> "It is worth noting that, as a member of the international community, Kuwait's foreign policy is based on the principle of respect for the independence and territorial integrity of States. It therefore condemns the use, financing and training of mercenaries and, on the basis of these firm standpoints, has not permitted such activities to take place on its territory and will never do so. Moreover, it supports no mercenary activity in any other State. As for the legislative measures adopted by Kuwait in order to ensure that its territory is not used for the purposes of recruiting, financing and training mercenaries, it should be pointed out that, as Kuwait does not suffer from this phenomenon and has never experienced any such activity throughout its long history, it has not promulgated any legislation on mercenaries. Kuwait, however, acceded to the four Geneva Conventions of 1949 for the protection of war victims pursuant to the Royal Decree issued on 12 August 1967 and to Protocols I and II thereto pursuant to the Royal Decree issued on 3 December 1984, all of which became part of Kuwaiti national legislation."

10. The Permanent Mission of Lebanon to the United Nations Office at Geneva, in a note verbale dated 23 July 2001, stated that:

> "(a) There are no mercenaries in Lebanon;
>
> "(b) Lebanon is opposed to any use of mercenaries as a means of violating human rights or of hindering the exercise of the right of peoples to self-determination;
>
> "(c) Lebanon has no information on the presence of mercenaries in the territory of other countries which might affect the independence of Lebanon."

11. In a letter dated 31 July 2001, the Permanent Representative of Latvia to the United Nations Office at Geneva informed the Special Rapporteur that:

> "There are no stated facts in Latvia about the existence of any mercenary activities such as recruitment, financing, training, assembly, transit or use of mercenaries. Furthermore, there is no information available to the authoritative and competent State institutions, such as the Ministry of Defence, the Ministry of Foreign Affairs and the Ministry of the Interior, about occasions in which citizens or non-citizens of the Republic of Latvia have taken part as mercenaries in other States and committing acts against the sovereignty of other States, against the exercise of the right of other peoples to their self-determination or committing human rights violations. There is not any information on mercenary activities in the territory of another State that affect or could potentially affect the sovereignty of Latvia or the exercise of the right of Latvians to self-determination or their enjoyment of human rights. I am pleased to apprise you that with a Decree of the Supreme Council of the Soviet Republic of Latvia of 20 November 1991, the Republic of Latvia acceded to the General Conventions of 12 August 1949 on the protection of war victims and its First Additional Protocol of 1977. The aforementioned Convention and Protocol are in force since 24 June 1992.

"Inasmuch as the Republic of Latvia has not had any experience concerning mercenary activities, the term 'mercenary' has not been defined in the normative acts of Latvia.

"The Republic of Latvia foresees criminal responsibility for crimes against humanity and peace, war crimes and genocide (chapter IX of the Criminal Code) and crimes against the State (chapter X), crimes which the International Convention of 1989 qualifies as the most characteristic crimes done by mercenaries.

"Any person can be held responsible for committing any crime foreseen in the Criminal Code if it is committed in the territory of Latvia. Article 4 of the Criminal Code foresees the circumstances in which the Republic of Latvia can bring to trial a person who has committed a crime outside of the Latvian territory. By such a legal way the Republic of Latvia states a strong position for the protection of humanity and peace around the world."

12. In a letter dated 2 August 2001 the Permanent Representative of the Republic of Panama to the United Nations Office at Geneva replied to the questionnaire sent by the Special Rapporteur as follows:

"(a) There is no information indicating the recruitment , financing, training, assembly, transit or use of mercenaries in the territory of the Republic of Panama;

"(b) There is no information indicating the participation of Panamanian nationals as mercenaries in acts against the sovereignty of other States or the exercise of the right of other peoples to self-determination, or in violations of human rights;

"(c) No information is available on mercenary activities in the territory of another State from which action could be taken affecting or that might affect the sovereignty of the Republic of Panama. We cannot exclude the possibility that an armed movement in the neighbouring Republic of Colombi . might attempt such action;

"(d) We have no information on the participation of mercenaries in the commission of internationally wrongful acts in the Republic of Panama;

"(e) The Republic of Panama is not yet a State party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. However, the competent national authorities have recently expressed the view that Panama should accede to the Convention [see below for information on the international treaties to which Panama is party];

"(f) To enhance the international treatment of the topic we suggest:

(i) Establishment of effective mechanisms for international cooperation for the purpose of exchanging information on mercenary activities (database). Establishment of a practice among States of providing early notification of the existence of mercenary activities, not only to

the State affected or the State of which the mercenary is a national, but to all States. In this regard we suggest the creation of a body within the United Nations system, to function as a centre for the coordination and subsequent dissemination of such information;

(ii) In our view the definition contained in the 1989 International Convention is adequate."

13. In a letter dated 17 September 2001 the Permanent Representative of the Republic of Azerbaijan to the United Nations Office at Geneva replied as follows:

"Under article 114 of the new Criminal Code of the Azerbaijan Republic, which entered into force on 1 September 2000, the recruitment, training, financing or other material support to mercenaries and the use of mercenaries in conflicts or military operations constitute a criminal offence;

"Under the same article, such actions committed by an official using his official position or in respect of minors constitute a criminal offence. The participation of a mercenary in a conflict or in military operations is punishable under the same article of the Criminal Code;

"Under the said article, actions connected with the planning, preparation, initiation, or conduct of military operations during a period of conflict are considered to be war crimes. 'Mercenaries' means persons who are not citizens of a State participating in an armed conflict and in military operations, as well as persons who have not been directed to perform official duties, but are acting for the purpose of obtaining material reward."

14. In a note verbale dated 26 October 2001 the Permanent Mission of the Republic of Peru stated:

"A report (460-2001-INI-1704) by the Office for Oversight of Security Services, Arms, Munitions and Explosives for Civilian Use of the Ministry of the Interior (DICSCAMEC) states that the Office for Oversight of Private Security Services oversees and monitors the activities of civilian private security services. In this regard, with the aim ensuring the suitability of such services, a model is being designed to create an occupational profile for individuals engaged in security services, with due regard for respect for human rights. Thus, any natural or legal person authorized to offer security services has commitments and obligations vis-à-vis DICSCAMEC under its private security services regulations. Private security companies hire individuals with military and/or police backgrounds as they are considered suitable for security functions. They have a group of instructors trained in self-defence and military skills. They also have a group of professionals, lawyers, psychologists, etc., to provide technical and administrative support (...);

"The Human Rights Office of the National Police Headquarters indicated in a report (75-2001-EMG-PNP/DIRDEHUM) that a number of military personnel have been on a 'combat techniques' course: six officers in April 1998; seven in October 1998; a junior officer in April 1999; seven officers and two junior officers in May 1999; two junior officers in June; four officers and two junior officers in October and a civilian employee in December 1999. This provides specialist training. It would be unwise to reach the conclusion that personnel who have been through the course might engage in covert military activities, as their overt activities provide no such indications. Lastly, the national police force has no elite 'Zeus Group' among its units. The national police have no record that any instruction has been given in attack techniques to prepare for residential raids or assaults on vehicles, or in the use of sophisticated weaponry that would suggest preparations for acts of violence that could threaten human rights. Neither has it been possible to establish the presence in Peru, between 1997 and 1999, of Israeli officers to provide training in defence and combat techniques to the so-called 'Zeus Group'.

"Still less has it been determined that such a supposed elite force would have been tasked, among other things, with protecting and ensuring the personal safety of the then principal adviser to the National Intelligence Service, Vladimiro Montesinos Torres."

15. The Special Rapporteur again wrote to the Government of Peru on 6 December 2001 requesting further clarification. It would appear that the government offices consulted had understood the Special Rapporteur's request for information as charging units of the national police with mercenary activities. This is not at all the case. The reports received by the Special Rapporteur refer to allegedly illegal activities by former presidential adviser Vladimiro Montesinos in connection with the possible contracting of mercenaries of Israeli origin, acting unlawfully and with payments and disbursements of money of unknown origin. The mercenaries reportedly trained selected military and police personnel outside official procedures, so as to form a personal guard for the former adviser, in violation of legality. It is this extreme case that the Special Rapporteur wishes to have information on. The Special Rapporteur is aware that the alleged activity would have taken place outside the law, in violation of current procedures and in all likelihood without the knowledge of the official commands responsible for the regular activities of military and police personnel.

II. FIRST MEETING OF EXPERTS

16. In compliance with resolution 54/151 of the General Assembly, of 17 December 1999, and 2000/3 of the Commission on Human Rights, the Office of the High Commissioner for Human Rights organized the first of two meetings of experts on the subject of mercenaries which were convened to study the forms currently taken by mercenary activities and to propose recommendations for an updated legal definition of the concept of mercenary.

17. The meeting was held in Geneva in the last week of January 2001 and was attended by eight invited experts from various regions and by the Special Rapporteur. The detailed and extensive analysis comprised aspects relating to the development of mercenarism over time, the

means employed by mercenaries, the most visible cases of such activities, the problems raised by the current definition of a mercenary under international law and ways of strengthening the United Nations in pursuing its aim to put an end to mercenary activities throughout the world.

18. The progress made at the first meeting of experts suggests that the second meeting should be planned without delay, perhaps for the second week of May 2002. The agenda should include the following items: clarification and formulation of a proposed legal definition of a mercenary; possible links between terrorism and mercenary activities; and the question of private military security companies operating in the international market offering services with mercenary personnel. A final topic would cover the consequences of the entry into force of the International Convention against mercenary activities.

19. This new agenda would complement the subjects addressed at the first meeting which included study of the background to the approach of the United Nations to the phenomenon of mercenaries; the state of international legislation on that subject, with special emphasis on article 47 of Additional Protocol I to the Geneva Conventions, regional legislation, particularly the Organization of African Unity Convention; national legislation and evaluation of the means used to implement existing legislation.

20. The analysis of the international definition of mercenaries was rightly given particular emphasis, also bearing in mind aspects relating to the legal framework of the issue and the difficulties of considering the various forms taken by the mercenary component. The meeting also addressed case studies such as the presence of mercenaries in Africa and the national cases of the Russian Federation and Colombia.

21. The report of the meeting is of great importance, and the Special Rapporteur would like to point out that the meeting served to emphasize that mercenary activities have increased and diversified, thereby exacerbating the problem of the lack of an appropriate legal framework which would not only contain in its definition the various forms taken by mercenary activity but from which punitive standards would be derived. The meeting also agreed on the need to expand the mandate of the Special Rapporteur, bearing in mind the violations of human rights resulting from such activities as illicit arms trafficking, drug trafficking, terrorist acts and other unlawful acts committed with the participation of mercenaries.

22. It should also be pointed out that the meeting of experts spent some of its time discussing the considerable increase in private security companies offering services in the military field. The experts were not opposed to the operation of such firms on the international market, recognizing, in particular, that they were efficient firms offering a wide range of services. However, the experts agreed in stating their disapproval of the participation of such firms in armed conflicts through mercenary units forming private armies. In that connection they pointed out that States had an obligation to exercise control so as to prohibit security firms from participating in armed conflicts, creating private armies, engaging in illicit arms trafficking, being involved in the illegal extraction of natural resources and, in that context, employing mercenaries.

23. Another point the Special Rapporteur would like to stress is that the experts did not feel that mercenary activities should be considered solely in connection with situations impeding self-determination. That is, of course, one of the rights that mercenaries violate, but there are other violations of human rights and international humanitarian law that should also be considered. The experts tended to see mercenary activity as a criminal act that could result in grave violations of the human rights of those affected by their actions.

24. Lastly, the group of experts accorded special importance to a systematic review of the definition of a mercenary, noting that the elements in a new or broader definition of a mercenary should include motive, purpose, payment, type of action and nationality. They also said that the definition should leave open the possibility of a connection between the mercenary act and other crimes, such as terrorism, arms trafficking and organized crime, in which mercenaries might be directly or indirectly involved.

III. MERCENARY ACTIVITIES IN AFRICA

25. One of the chief motives for creating the function of Special Rapporteur on the use of mercenaries was the intention of the United Nations to contribute to the effective exercise of the right of the African peoples to self-determination. In this connection the Special Rapporteur wishes to draw the attention of the Commission on Human Rights to the observations he made recently before the Third Committee of the General Assembly on the armed conflicts affecting Africa. Unfortunately, 14 years later, peace continues to elude many of the peoples of Africa. In many parts of the continent armed conflicts, sometimes of regional scope, are destroying the lives of thousands of Africans. Mercenaries are involved in many of these conflicts, through training contracts, direct participation in combat or involvement in the illicit trafficking that proliferates in areas affected by armed conflict.

26. The end of the cold war and of the apartheid system which used to be major threats to the freedom of peoples who had recently achieved independence, has not, as hoped, meant an end to confrontations and conflicting interests in Africa. Instead, there has been serious social and political disintegration accompanied by armed conflict. The facts testify to serious situations, deterioration of the nation State, grave crises threatening government stability and dogged struggles for the control of rich natural resources, including petroleum and mineral deposits. Wars are being fought for control of rich diamond deposits. Diamonds are a factor in the ongoing conflicts in Angola, the Democratic Republic of the Congo, Liberia and Sierra Leone and the developing conflict in southern Guinea.

27. In Côte d'Ivoire, hundreds died in October 2000 as a result of street violence following the presidential elections, when the leader of the military junta, General Robert Guei, suspended the vote recount that was going in favour of his opponent, Laurent Gbagbo. Hundreds more died in the Central African Republic following a failed coup attempt by the former dictator, General André Kolingba, in late May 2001.

28. Through the Revolutionary United Front in Sierra Leone, Liberia controls diamond production in Sierra Leone and is benefiting heavily from smuggling precious stones. Its smuggling activity enables the Revolutionary United Front to purchase arms, which fuel the continued conflict, despite the signing of ceasefire agreements. Liberian President

Charles Taylor and the Front are also financing and arming the group known as the Rassemblement des Forces Democratiques de Guinée, which aims at deposing Guinean President Lansansa Conté.

29. Since August 2000, the combined forces of the Liberian army and guerrilla fighters of the Revolutionary United Front have made forays to attack refugee camps in the south of Guinea in pursuit of members of the Liberian Ultimo-K movement, which is opposed to President Taylor. In addition to infantry, the attacks have been carried out with helicopters and heavy artillery.

30. The long series of armed conflicts on the continent involving a mercenary element shows that the exercise of the right to self-determination by the African peoples, or for that matter their control over their own natural resources or the rational utilization of them, is by no means assured.

31. The problems in Africa have only worsened, particularly in the western portion of the continent, rich in high-quality diamonds and in mineral and petroleum resources, which arouse the greed of unscrupulous politicians, merchants operating in the global market and members of criminal organizations who enrich themselves by plundering and smuggling gems and precious stones. As might be expected, mercenaries are no strangers to these criminal activities.

32. In his earlier reports the Special Rapporteur mentioned the involvement of mercenaries in armed conflicts in Angola, Chad, Liberia, Mozambique, Namibia, Rwanda, Somalia, Sudan, what was then Zaire, Zambia and Zimbabwe. The Special Rapporteur also discussed the political instability, nearly always accompanied by armed violence, that afflicted Benin, Botswana, Burundi, Cameroon, Comoros, Djibouti, Lesotho, Niger and Togo and the use of mercenaries by the racist regime of South Africa. The apartheid regime used to resort to mercenaries to destabilize political regimes considered to be socialist or unfriendly Governments and to attach the leaders of the African National Congress, an example being the assassination of Chris Hani by a Polish mercenary in April 1993.

33. The Special Rapporteur was informed that a South African citizen, Johan Niemoller, who was accused of having helped to plan, when he was a member of the apartheid regime death squad known as the Civil Cooperation Bureau, the assassination of Anton Lubowski, a member of the South-West Africa People's Organization, was seen in western Europe recruiting mercenaries to fight alongside the União Nacional para a Independência Total de Angola (UNITA). Niemoller was recently sentenced to a conditional two-year prison term, and a fine of 100,000 rand by the Krugersdorp court in South Africa for smuggling diamonds brought out of Angola illegally and shipped to Antwerp via South Africa. The value of the contraband was in the millions. At the same time, he supplied weapons to UNITA. Niemoller is also leader of the extreme right-wing South African group, Die Volk, allegedly involved in stealing weapons from South African barracks in 1998.

34. The conflict in Angola, fed by the illegal exploitation of its diamonds and other natural resources, continues to affect the civilian population of the country and threaten regional peace

and stability. The ceasefire agreements and sanctions and embargoes in place are not observed. It seems necessary for the Commission to reiterate its commitment to the Angolan people that their right to self-determination will be guaranteed, as will the sovereignty and territorial integrity of their State.

35. The Special Rapporteur's reports show that those conflicts revolved around the exercise of the right to self-determination of the African peoples. Today, however, the conflicts appear to revolve around a different problem, namely, control of natural resources such as petroleum, uranium, magnesium, bauxite and, above all, diamonds and other precious stones. Greed to possess them is now the chief motive for destabilizing legitimate governments, arming rebel groups and inciting internal conflicts. Those who, from Europe, control the markets in precious stones, particularly gemstones and diamonds, are not uninvolved in these conflicts.

36. Liberia's involvement in the illicit traffic in diamonds has led to the imposition of trade sanctions against that country, including those adopted by the Security Council in its resolution 1343 (2001) of 7 March 2001, which went into effect on 7 May 2001.

37. It is estimated that diamonds worth US$ 1.2 million are brought out of Angola illegally each day. UNITA has been trading diamonds for arms purchased from Eastern Europe by way of Togo, Israel (Tel Aviv) and the United Kingdom (London). With money obtained from exporting to Antwerp diamonds mined in northern Angola, UNITA buys weapons in Bulgaria. The proceeds of diamond trafficking, estimated at between US$ 3 and 4 billion, have enabled UNITA to build up its armed units and strengthen its combat positions by hiring mercenaries. The Special Rapporteur has pointed out on earlier occasions that there is a need to correct serious flaws in the system for monitoring the sanctions imposed on UNITA by the United Nations and the prohibition on the mining and selling of diamonds in the areas controlled by UNITA, which have been in place since 1998. Despite that prohibition, it appears that Canadian stock exchanges continue to list the stock of firms that operate diamond mines in the areas controlled by UNITA.

38. The Antwerp market is under strong suspicion of benefiting heavily from this illicit diamond trade, which amounts to several billion dollars annually. As mentioned above, the diamonds are reportedly sent to Antwerp from Angola via Togo, Tel Aviv and London. The mercenaries involved in the traffic are said to be recruited in London. It is said that the Angolan conflict, which has worsened since 1998, when UNITA ceased to comply with the Lusaka Protocol, could not continue if the illicit traffic in diamonds were stopped. In May 2001, UNITA kidnapped 51 boys and 9 girls during an attack against the northern town of Caxito that left more than 200 people dead or missing. The sanctions and embargo imposed by the organization have had no further impact in practice. Virtually no shipments of Angolan diamonds have been intercepted.

39. Diamonds are also a key factor in the armed conflict in Sierra Leone. Despite the formal ceasefire, Revolutionary United Front combatants are still armed, still control important diamond-mining areas and still engage in pillaging and commit terrorist attacks - such as the renewed attack on Freetown in May 2000 - and violations of international humanitarian law. Here, again, there are foreign mercenaries involved in selling weapons to the Front and trafficking in diamonds.

40. In this situation, there should be no let-up in efforts to investigate and suppress illicit trafficking in diamonds and arms and the involvement of mercenaries in such trafficking. The Revolutionary United Front continues to use its control over diamond mines to finance its activities, which in the past few years have included the large-scale and systematic commission of some of the worst crimes the world has witnessed. The international community must not remain indifferent to these violations of the most basic human rights, but must investigate the possible complicity, by act or omission, of those who benefit from the illicit trafficking.

41. In that regard, it should investigate the stance of the diamond producers, diamond exchanges and associations of diamond manufacturers in relation to Angola, Liberia and Sierra Leone, as well as the firms and organizations that participate in the illicit or undercover trade in diamonds, precious stones and petroleum. It should determine their responsibility for the continuation of the armed conflicts that afflict Africa and the resulting violations of human rights and international humanitarian law. In this regard, valuable work is being done by non-governmental organizations such as Amnesty International, Doctors Without Borders, Partnership Africa Canada, Human Rights Watch, Intermón, International Action against Hunger, International Alert, Médicos del Mundo and Medicus Mundi Internationalis.

42. It is hard to believe, as some diamond manufacturers and merchants allege, that only 4 per cent of the world trade in rough diamonds, which amounts to US$ 7 billion, is illicit in origin. In the absence of adequate, effective controls, it must be assumed that the percentage is actually much higher. In this context, the Special Rapporteur welcomes the recent South African Kimberley Process initiative, which seeks to establish an international system for the certification of diamonds from countries at war ("blood diamonds"). The aim is to establish a certification committee and a tracking and oversight board. In addition, the South African Diamond Board has established an office in Kimberley, considered a crossroads in diamond trafficking, to determine provenance. It is claimed that many diamonds illegally brought out of zones controlled by UNITA are placed with certificates of origin indicating the Republic of the Congo or Zambia.

43. The armed conflicts affecting Angola, Liberia and Sierra Leone are not the only conflicts on the African continent. Other countries, such as Guinea, suffer from instability and the Congo is ravaged by war. Particularly noteworthy, however, is the expansion of illicit trafficking, particularly arms trafficking, which is on the rise in all regions. Unscrupulous dealers thus benefit from the scant resources available for African development.

44. Forty-one years after the Democratic Republic of the Congo gained its independence, the civil war which besets the country, and in which other African States are involved, is costing the country 80 per cent of its resources. Troops from Angola, Namibia and Zimbabwe support the Government of President Joseph Kabila, while forces from Rwanda and Uganda continue to back the rebels, chiefly the Movement for the Liberation of the Congo, led by Jean-Pierre Bemba, and the Congolese Rally for Democracy, led by Adolphe Onusumba. The ceasefire agreed to in 1999 has been violated repeatedly. On the frontier with Uganda, ethnic classes between Lendu and Hema groups continue, the latter being supported by Ugandan forces.

45. Notwithstanding the Lusaka Ceasefire Agreement, there is continued fighting in the eastern part of the country. The withdrawal of Namibian forces is a step towards the withdrawal of all foreign troops from the country, in accordance with Security Council resolution 1304 (2000). Nevertheless, the cities of Kindu and Kisangani have not been demilitarized and the illegal exploitation of the country's natural resources, which are still being used to finance fratricidal warfare, continues.

46. The presence of mercenaries in the Congo is not new. Recent studies have confirmed that Belgian, French and South African mercenaries were recruited and hired to fight side by side with the secessionist forces of Katanga led by Moise Tshombe, and that Belgian mercenaries participated in the torture and subsequent assassination of Patrice Lumumba, the first Prime Minister of the Congo. These foreign elements must be demobilized and surrender their weapons to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), and then leave the country, with a full guarantee of their physical safety and their lives.

47. The Special Rapporteur has been studying the nature of the conflicts that affected and continue to affect Africa and proposing a global policy to safeguard the life, personal integrity, freedom and safety of individuals and ensure respect for the sovereignty of African States. The Special Rapporteur considers it advisable to continue the course mapped out in the report of the panel of experts established pursuant to Security Council resolution 1237 (1999) on the situation in Angola (S/2000/203) and by the panel of experts established by the Security Council Committee pursuant to resolution 1132 (1997) concerning Sierra Leone (S/2000/756). Within this context, he stresses the need to respect the right of the peoples of Africa freely to decide their future, their political systems and the rational use that they wish to make of their resources. Otherwise, armed conflicts, together with hunger, poverty and disease, will cast their shadow over millions of Africans, threatening them like a deadly plague.

IV. CURRENT STATUS OF MERCENARY ACTIVITIES

48. Mercenary activity is a worldwide phenomenon. It is not related solely to problems of political instability or a wish to aggravate such problems so as to benefit from the exploitation of natural resources in certain States. The mercenary, as an individual, in common with mercenarism as criminal conduct involving a State or organization making use of mercenaries for specific aims, meets the purposes of evil interests that can affect the right of a people to self-determination, the stability of a constitutional Government, peace in one region or public security and tranquillity in others, or the breakdown of the legal order through illegal trafficking which severely disrupts life, liberty, health, physical integrity and positive social coexistence.

49. In this sense, mercenary activities are a recurrent theme worldwide, because they are found wherever there is fertile ground, whether armed internal or international conflict, a covert operation by a State or political organization against another State with the aim of destabilizing it, illicit trafficking with the aim of unlawfully obtaining large sums of money, or an act of terrorism intended to sow panic and intimidation at the local or international levels. No significantly violent act in contravention of international law is alien to mercenary activities; such an act may, and has been, a component of such activities. It is thus no exaggeration to note the regrettably recurrent and worldwide nature of mercenary activities.

50. Mercenary activities have survived the end of the cold war, but methods have changed: there are still individual mercenaries who enlist to fight in internal armed conflicts within a country, just as there are mercenaries within today's international military security companies, or who engage in their trade to participate in illegal trafficking in drugs, diamonds and weapons. Yet although the link, the manner and the nature of the activity in which mercenaries participate may change, that does not change the mercenary status of those who take part in illicit acts, offering and selling their professional skills for pay, well knowing that it is not for a noble cause, but to kill and destroy outside any licit or ethically permissible context.

51. In recent conflicts in Africa, Asia and Latin America, there has been recourse to the recruiting and hiring of mercenaries, owing to their military experience and combat effectiveness. In many cases, such persons could not be categorized as mercenaries if the requirements established by article 47 of Additional Protocol I (1977) to the 1949 Geneva Conventions were applied cumulatively and concomitantly. The Special Rapporteur nonetheless considers them mercenaries, despite the fact that the existing legal definitions are vitiated by gaps and juridical shortcomings and fail to take into account situations and activities that are mercenary in nature. These shortcomings have been made good to some extent with the entry into force of the 1989 International Convention.

52. In general the new methods employed by mercenaries escape the few prohibitions that domestic legislation and international law place on mercenary activities. Nevertheless these activities cause serious harm to the persons and peoples suffering their effects; the evils they produce not only constitute human rights violations, those responsible are professionals, specifically hired for their effectiveness in causing harm. The United Nations should therefore devote time and resources to the study and analysis of the various ways in which mercenaries are used and act and of those who employ them, while recognizing that this is not merely a legal question of definition, but also a question of actions and situations that affect life, security and international peace.

53. In this vein the Commission on Human Rights has confirmed in its recent resolutions that the presence of mercenaries should be studied and identified in connection with various criminal activities. This consideration emphasizes the risk posed by the use of mercenaries for the perpetration of various unlawful acts and the violation of human rights and international humanitarian law, even in cases that may not be directly connected with self-determination. In accepting the suggestions made by the meeting of experts, the Commission thus strengthened the United Nations condemnation of mercenary activities.

54. Another aspect of mercenary activities today relates to the connection with acts of terrorism. The following section of the report deals with this issue. It should be noted that while the link exits, it is not a systematic and permanent relationship, but, rather, opportunistic, circumstantial and ad hoc, although the effect is lethal and extremely harmful.

55. Indeed an analysis of cases shows that some terrorist attacks are carried out by militants indoctrinated and fanaticized with fundamentalist ideological concepts who view recourse to terrorism as a "legitimate" means of achieving certain objectives. Underlying many terrorist attacks is a fundamentalist conception that aims at collective intimidation by sowing fear and panic. However, there also exist terrorist acts that are simply the expression of interests of

specific Governments, political organizations or entities which, in the name of the struggle against certain regimes, do not hesitate to resort to terror. Such entities resort to the use of mercenaries to commit terrorist acts.

56. Such mercenaries are not motivated by any fundamentalism, but rather by the payment which they receive for committing unlawful acts. Their experience, training and effectiveness in destroying and killing render them useful for carrying out terrorist acts. In other words, the act in itself remains by nature terrorist but at the same time takes on a mercenary character owing to the agent executing it.

57. The Special Rapporteur feels that when investigating a terrorist attack the possibility that it has been committed by a mercenary must also be examined. The connection between terrorist act and mercenary activity cannot be ruled out.

58. In general, mercenary activity is not spontaneous. It usually occurs as a result of conspiracy to commit crimes. It is also commonly associated with other unlawful activities such as traffic in persons, drugs and arms. Some armed conflicts have broken out because of the existence of weapons markets that encouraged them, while others are unnecessarily prolonged for the same reason. Mercenaries are present in such traffic. Recourse is had to mercenaries for arms shipment, whether as pilots, co-pilots, flight engineers or providers of armed security. They are also hired to act as dealers in the field or as instructors in the use of the war material sold.

59. Those trained in the use of armaments are usually military personnel but may also be members of guerrilla organizations or paramilitary groups with no significant military preparation. In illegal arms traffic, payment is effected in cash, but may also be in kind. In recent conflicts, weapons have been paid for with diamonds and other precious stones, petroleum or drugs, as can be seen in the cases of Afghanistan, Angola, Colombia, Liberia and Sierra Leone. The mercenary agent plays his part in such traffic without any concern as to what use will be made of the weapons or what damage they may cause. The magnitude of the phenomenon is astonishing, and the international community is not adequately protected against it. Efforts should be made to elaborate regulatory instruments for effectively thwarting that activity and to strengthen the political will to put an end to such illicit traffic.

60. Lastly, the diversification of and growth in mercenary activities has been possible because some States have adopted an indifferent, unheeding and even permissive attitude towards mercenary activities. To be absolutely clear on this point, there is no uniform posture on the part of Member States of vigorously combating and completely prohibiting mercenary activities in all their aspects.

61. Penal legislation in most Member States suffers from serious gaps with regard to the treatment of those who make available for pay their professionally skilled services for the performance of acts that can seriously harm substantive and basic personal right, affect institutions and even involve terrorist attacks in States, sowing destruction, death and panic, with the aim of inflicting damage on a Government on political, ideological, religious or other pretexts. The consequences of these legal lacunae are twofold. On the one hand, a feeling of permissiveness that has allowed the use of mercenaries for various activities that under legal

regimes offering effective protection for human rights and respect for self-determination should be severely restricted or prohibited. On the other hand, some States display an interventionist tendency in the context of their regional or hemispheric strategies, with covert operations by their intelligence services which result in criminal attacks on individuals and countries. The commission of such acts has frequently involved the recruitment, training, financing and use of mercenaries. Empirical verification of this type of mercenary activity is offered by instances of countries which have suffered aggression, to which the Special Rapporteur has referred in earlier reports.

62. The result of this situation is that broad impunity facilitates the continuation of mercenary activities. This is a serious and verifiable fact. A number of questions arise: how many mercenaries, publicly known for their acts, have ultimately been tried and sentenced? How often has mercenary status been taken into account as an aggravating factor? How many States have prohibited and punished interventionist, in some cases criminal, activities by their intelligence services? The reply must be given by the courts and by States, but it is the obligation of the Special Rapporteur to note that in very few instances only have mercenary activities been identified and recognized as such or mercenaries been tried and sentenced. This situation is highly irregular and works to the benefit of mercenaries and those who encourage their activities. Express condemnation of mercenarism and of mercenary activities necessitates, in the context described, a genuine commitment by all States to combat and severely punish this activity, which directly affects the enjoyment of human rights and self-determination.

V. TERRORISM AND MERCENARY ACTIVITIES

63. The terrorist attacks of 11 September 2001 against the World Trade Center in New York, the Pentagon in Washington, DC, and the hijacking of the aircraft that crashed in Pennsylvania deserve the most stringent and energetic condemnation and the most severe punishment for those responsible for the planning, financing, preparation and execution of these terrorist acts. The treachery and evilness evident in the necessarily long and meticulous planning of the operation, the hatred evident in the attempt to inflict the greatest degree of harm possible on a people and the evil execution which sacrificed thousands of innocent lives to the objective of breaching security and attempting to humiliate as much as possible a world Power such as the United States of America mean that this was the most serious terrorist attack in the history of mankind, both in terms of the death toll and the fact that no escape was possible from the perpetrators, who, in carrying out such bloody provocation, were in effect making a declaration of war and creating a situation that would inevitably affect the world order and world peace.

64. Incalculable harm was produced. No cause can be invoked to justify it. Attribution of responsibility for the act to this or that policy of the United States is a cynical and opportunist argument. In international relations and power strategies employed by Powers there are always differences, disagreements, questionings of global asymmetries and injustices which in the interplay of strategic interests at times affect entire regions and peoples. But none of these situations can legitimately be invoked when it leads to indiscriminate violence and criminal terrorism that kills, destroys property and seeks to turn peoples' lives into a perpetual torment of fear and terror.

65. Any act of terrorism is a mistaken response and a profound error. Terrorism cannot be good or justifiable. No one has the authority to conduct policies of terror, and the worldwide, vigorous condemnation of the terrorist attacks of 11 September should not only result in the severe punishment of those responsible but also foster the profound conviction that terrorist acts of all kinds must be extirpated, whether such acts are by States, as has frequently occurred in the past, or by any group or individual, acting in the name of false political, ideological, religious or other justifications.

66. We should also be quite clear that the growth in terrorist activities is due, at least in part, to an ineffectual response at the international level in combating terrorism in practice. The attacks of 11 September were foreshadowed by many attacks worldwide over the preceding 30 years or more. The United Nations has adopted more than 10 international conventions to combat terrorism, but it must be asked whether there has existed a common will on the part of States and enterprises and institutions of civil society to implement the security and monitoring mechanisms and intelligence policies that could have pre-empted the lengthy preparations for the terrorist acts.

67. The answer is that too much confidence has been placed in non-systematic security mechanisms. The reality of terrorist violence is otherwise. Violent organizations and their operatives have flourished owing to "innocent tolerance" on the part of Governments and the public, and have exploited the opportunities created by beneficial social coexistence, acquiring know-how that scientific progress makes available for the well-being of mankind, subverting it from this end and using it for destruction. Systematic observation of terrorism leads to one certain conclusion: wherever it has occurred, it has been at our expense, growing before our eyes and using for evil that which the innocent peoples of the entire world use in their day-to-day existences to live positively.

68. This brief analysis is fully borne out in this report by the Special Rapporteur to the Commission on Human Rights. Firstly, any act of terrorism is in and of itself an attack on human rights, which the special rapporteurs of the United Nations system have been appointed to protect and promote, and attacks on which we have an obligation to denounce and combat. Secondly, various United Nations resolutions, such as Security Council resolution 1373 (2001), invite cooperation, not only between States, but also between organizations of society in general and of course between United Nations bodies, agencies, machinery and experts so as to close ranks and work to avert, prevent and punish terrorism. Security Council resolution 1373 (2001) also makes reference to elements of terrorist activity that are related to the mercenarism which constitutes the Special Rapporteur's mandate, such as "transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potential deadly materials" etc. (para. 4). All this confirms, as the Special Rapporteur has maintained, that close links may exist, and de facto have in the past existed, between terrorism and mercenary activities.

69. The Special Rapporteur, in his earlier reports, has noted that the presence of mercenaries is usually related to various criminal activities. It would be an error to exclude possible links between mercenary activities and terrorist acts. This is not a permanent or systematic relationship. Analysis shows that most terrorist attacks are the result of a profound and serious distortion of political, religious or psychological concepts which leads to denial of the absolute

value of life, freedom and solidarity. Indoctrinated and fanatical militants, trained to destroy, and previously stripped of the human sentiments of pity and compassion, serve as the tools. Or use may be made of professional mercenaries to either prepare or execute the terrorist act. It is clear, and recent events have proven, that behind many terrorist attacks lie erroneous conceptions, nurtured by hatred, that use any means and resort to collective intimidation. Further, whatever the terrorist motivation, those who plan and prepare terrorism seek effective and certain fatal effects. It is thus inherent in the logic of terrorism to consider the possible use of professional mercenaries for specific preparatory acts or to carry out the act itself.

70. This hypothesis applies to any terrorist group, for example, the fundamentalism attributed to certain groups, such as the Al-Qaida group founded by Osama bin Laden. The membership of this organization may be confined to fanatical individuals espousing a distorted religious or political ideology, but that does not mean that a group of this type does not seek the support of mercenaries for a particular kind of operation, such as that required in the preparation and organization of a large-scale terrorist act.

71. Yet this is not the only means of perpetrating terrorism; there are other motivations, generally economic or political, that impel Governments and organizations of various kinds to incorporate terrorist actions in their strategies. Analysis of covert operations, of assassination of political leaders and of illicit trafficking reveals that mercenaries are often used in such types of terrorist activity. The Special Rapporteur again points out that the experience gained by mercenaries and their effectiveness in destroying and killing make them useful in any criminal activity. That is, the nature of the act itself is terrorist, but it becomes mercenary by virtue of the agent carrying out the act.

72. In this line of thinking, when investigating a terrorist attack or the presence of terrorists in an armed conflict the possibility must be considered that mercenaries may be involved. It is clear that the mercenary is nothing more than a tool, a link in the commission of the crime, but the mercenary's professional training may be essential to the success of a single criminal act or one committed in the context of an armed conflict. Account must also be taken of the fact that terrorist violence is decentralized, fragmented, without a contextual identity throughout the preparation stage, and indiscriminate in its effects at the time it is carried out, all of which favours the hiring, training and financing of mercenaries so that it is they who are used for execution of the acts, acts planned and directed by government or non-government bodies. In any event, since the preparation of a terrorist act is long and complex, in each case consideration must be given to the possibility that some of the preparations may have involved hiring mercenaries with specialist skills.

73. It is widely known that in general terrorists construct secret and very extensive support networks. These networks must be unearthed and eliminated; it is there, submerged in everyday society, that terrorism hides. It is an underground but real world, which worldwide feeds on laundered money, drugs, arms bought from traffickers, and where a mercenary, hired for pay, can be the last link in the chain required by terrorist violence. If measures to avert terrorism are to meet with success, account must be taken of the variables referred to, including, of course, the measures envisaged against mercenaries, since that will help to counter terrorism.

74. With regard to the state of war which has existed in Afghanistan subsequent to 11 September, it will be recalled that the Special Rapporteur considered the irregular situation in that country, noting, in his most recent report to the Commission on Human Rights (E/CN.4/2001/19), that he had received information on the presence of military training camps, where it appeared that training was being given to mercenaries who were then sent to fight in armed conflicts such as those occurring in Chechnya, Jammu and Kashmir or in northern Afghanistan. Unfortunately the communications sent by the Special Rapporteur to the Government of the Islamic State of Afghanistan and the Government of the Russian Federation requesting clarification concerning mercenaries trained by the Taliban received no reply. This demonstrates the need for thorough investigations into possible links between terrorism and mercenary activities to be conducted in all cases. The Special Rapporteur could not maintain a priori that the terrorists in the Al-Qaida organization include mercenaries, but neither would it be correct to say that its members are exclusively religious fundamentalists or volunteers.

75. Al-Qaida, in common with other organizations engaged in terrorism, seeks a high level of effectiveness in the conduct of terrorist acts and their impact. An investigation should be conducted into whether during the preparations for the terrorist acts mercenaries were contacted, recruited or used. This is an organization with deep pockets possessing the necessary resources. And, as the Special Rapporteur has maintained over the years, a possible connection between terrorism and mercenary activities cannot a priori be ruled out.

76. In circumstances in which terrorism shows indications of having refined its methods, the Special Rapporteur wishes to stress these links and the need to investigate not only individual mercenaries but all the support, operational and financial networks behind them. The Committee established pursuant to Security Council resolution 1373 (2001) should explicitly cover this aspect in its work. Similarly, it should remind all States of their obligation not to encourage any act which, directly or indirectly, could facilitate or authorize operations that might include terrorist acts, and of their obligation to prevent, investigate, and punish the use of their territory, the financing of mercenary activities and the establishment of networks.

77. Regrettably, vigorous action by the international community against mercenarism and mercenaries has thus far been lacking. Many have taken part in mercenary activities but have not been brought to justice. Of those brought to justice, many have been set free without punishment. Financial and tax havens, tools in the funding of mercenary and terrorist activities, continue to spring up on almost every continent without ever being seriously investigated. And powerful interests, protected by impunity, are involved. Mercenaries and terrorists have prospered with the lack of interest by major States in the international community, being protected in practice by this policy of "looking the other way".

78. The terrible events of 11 September 2001 show that it is high time to end this dangerous permissiveness and careful ambiguity. Mercenarism and terrorism must be clearly defined in national legislation, and mercenary status must be considered an aggravating factor in sentencing. But there are other areas in which we must move away from omissions and reluctance. The obligation of States to cooperate with investigations by other States affected by terrorist attacks, whether or not they involve mercenaries, must be recalled. Similarly, agreements must be concluded to facilitate prompt and immediate extradition, and there must be a general agreement to prohibit intelligent services from formulating or implementing strategies,

training personnel or participating in any activity, under the pretext of spying, obtaining information, destabilizing Governments, intervening secretly in internal armed conflicts, attaining specific political or economic aims and in general affecting self-determination, that might encourage, make possible or assist participation in terrorist attacks, however carried out.

79. Lastly, attention must be paid to the reprehensible presence and participation by mercenaries and their agents in criminal networks, such as international organized crime, trafficking in persons, illicit trafficking in weapons, explosives and drugs, money-laundering and financial havens, used by criminals and by terrorist organizations to amass and use the resources that allow them to carry out their criminal projects. Any investigation into terrorism or effective measures to combat it must cover these aspects.

80. Absolute clarity is essential so as to avoid unacceptable permissiveness. First and foremost any attempt to violate or fail to respect human rights in the name of combating terrorism more effectively must be avoided at all costs. Such an approach would lead to militarization across the world and embody serious dangers. Indeed it would differ very little from general, indiscriminate violence, interventionism and facile accusations without proof. We must not make the mistake of regarding critical opponents as supporters of terrorism, or of suspecting those who do not unconditionally align themselves with a specific anti-terrorist strategy of being sympathisers. To vigorously combat terrorism, yet to avoid falling into State terrorism, constitutes an imperative based on reason, ethics and the principle of respect for human rights.

81. There must be an end to the impunity that has protected terrorism and mercenaries who have committed or participated in terrorist acts. Yet before unilateral, on occasion inevitable responses, such as self-defence, are engaged in, the need for proportionality means that multilateralism must be strengthened. In this regard it is essential to reinforce the role of the United Nations and fully implement the provisions of Security Council resolution 1373 (2001). All such resolutions must be implemented effectively, in which connection the cooperation of all States is essential. The fight against terrorism requires true leadership by the Organization.

VI. PROBLEMS RAISED BY A LEGAL DEFINITION OF MERCENARISM

82. In this section the Special Rapporteur presents a set of conceptual elements already mentioned in his report to the General Assembly. These concern the current status of the legal definition of mercenarism, given the need to review and update a legal definition that would allow more effective action to eliminate mercenary activities and thus comply with the recommendations by the Commission on Human Rights and General Assembly.

83. Throughout history the term mercenary has been used to define, in a general sense, persons, conduct and outlooks far removed from the military sphere. The concept of mercenary has also been used, and continues to be used, simply to offend or discredit. It quickly became apparent, however, that from a legal standpoint there was need for a definition to determine who

was and was not a mercenary. The first attempt at a definition was made in article 47 of Additional Protocol I to the Geneva Conventions of 1949. The aim, however, of the provision was not to define the concept, but, rather, to establish to whom the status of combatant and prisoner of war should be applied.

84. Throughout history the following elements have been present in the concept:

(a) Financial considerations, the desire for profit, benefit or material private gain as motivation for participating in an armed conflict or concerted act of violence. This element excludes conscripts, recruited to perform compulsory military service, and those who are called up; nationals who enlist as volunteers to defend or fight for their country as members of the regular armed forces without being compelled to do so; and also foreign nationals who act out of humanitarian, ideological, political or religious convictions. The foreign nationals who went to Spain to defend the Government of the Republic against the coup d'état without any personal or material interest or those who joined the allied forces against the fascist regimes in Europe in the Second World War cannot properly be termed mercenaries;

(b) Not forming part of the regular armed forces at whose side the person fights or of those of the State in whose territory the concerted act of violence is perpetrated. This aspect excludes foreign nationals who are members of special vanguard units or foreign legions which have formally agreed to form part of a regular army as regular elements, in an act which may be assimilated to that of a foreign national who applies for and acquires the nationality of another country;

(c) Having been recruited and contracted for, and having effectively participated in, armed conflict as a combatant, or in armed, subversive or terrorist action, as an active participant. This excludes military advisers or counsellors;

(d) Traditionally, being a foreign national, that is not a national of the party being fought for; a criterion extended to not being resident in a territory controlled by a party to the conflict or of the State against which a concerted act of violence is perpetrated; and

(e) Payment, an objective and verifiable element defining the nature and status of the action. However, under international instruments currently in force the pay must be substantially in excess of that promised or paid to regular military personnel of similar rank and functions. In general these elements were reflected in article 47 of Additional Protocol I to the Geneva Conventions and the 1989 International Convention. It will be appreciated that these elements are, of necessity, cumulative; that is, it is not sufficient for one only to be present, all must be met. This makes it difficult to categorize someone as a mercenary. This difficulty makes it hard to implement the legitimate right to punish mercenaries.

85. It should be borne in mind, however, that Additional Protocol I to the 1949 Geneva Conventions is an instrument of international humanitarian law, the aim of which is to humanize, as far as possible, armed conflicts, and not to define what is meant by mercenary or who should

be considered a mercenary. The aim, rather, is to extend combatant and prisoner-of-war status to the greatest number of individuals, and to exclude such status only in specific exceptional cases, such as that of mercenaries.

86. The criteria of financial gain or profit or intent are easily accepted by countries with a Romano-Germanic legal tradition, but not by those with an Anglo-Saxon legal tradition. During his visit to the United Kingdom of Great Britain and Northern Ireland the Special Rapporteur understood that British jurists emphasize the commission of the act itself, whether crime or offence, and that the motivation to commit it is not the principal element. What is important is that the person killed, robbed or assaulted, that is, the act committed rather than the motivation. The reasons, whether emotional, financial or ideological, are less important than the fact that the act is committed.

87. Review of the legal definition of mercenary must focus on the aim and motivation so as to propose a sufficiently broad concept as to embrace the various criminal situations in which a mercenary component appears.

88. A further key element relates to the need to be a foreigner to be considered a mercenary. This ignores the significant phenomenon of nationals who act against their own country for remuneration from a foreign Power or organization. The Cuban authorities explained to the Special Rapporteur during his official mission to that country in 1999 that this was one of the main preoccupations of the Cuban Government with regard to the definition in Additional Protocol I and the 1989 International Convention. For 40 years Cuba had been the victim of acts of aggression and terrorist acts committed by its nationals based on foreign territory or acting in return for pay from foreign organizations based abroad.

89. If nationals are contracted for the clear purpose of being used as mercenaries, with the mercenary aspect hidden behind the fact that they are nationals, the standard applied should exclude nationality and focus on the mercenary nature of the act. Thus the question of the requirement of being a national of a country other than the country affected by the mercenary's activity must be reconsidered and analysed in greater depth, so that the definition lays more emphasis on the nature and aim of the unlawful act to which an agent is connected by payment. Further, if being a foreigner is a requirement or sine qua non for being considered a mercenary, it would suffice to obtain the nationality of the country being fought for to cease to be considered a mercenary. The Special Rapporteur noted this during his visits to the successor countries to the former Yugoslavia.

90. The Special Rapporteur trusts that these aspects will be further analysed at the second meeting of experts, to be organized by the Office of the High Commissioner in 2002. The first meeting of experts agreed on the need to analyse and discuss this requirement in more detail. While the definition contained in the international instruments in force was initially considered positive, as a first step, the tendency today is to view it as partial and incomplete, not applicable to new types of mercenary activities or the criminal responsibility of legal persons, such as private security and military consultancy companies, which contract mercenaries.

VII. ENTRY INTO FORCE OF THE INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

91. The Special Rapporteur welcomes the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly in its resolution 44/34 of 4 December 1989. The Commission on Human Rights had entrusted the Special Rapporteur, pursuant to his mandate, with keeping it informed of the signatures and ratifications of and accessions to the International Convention, and had repeatedly urged Member States to consider the possibility of prompt signature, ratification and accession. Ultimately, the International Convention entered into force on 20 October 2001, 30 days after Costa Rica, the twenty-second signatory, deposited its instrument of accession with the Secretary-General.

92. The International Convention expands on the definition of a mercenary contained in article 47 of Additional Protocol 1 to the Geneva Conventions of 1949, in particular with respect to those who are specifically recruited to participate in concerted acts of violence with the aim of overthrowing a government, or undermining in any other way the constitutional order of a State or its territorial integrity. Article 1 (2) of the Convention provides that:

> "2. A mercenary is also any person who, in any other situation:
>
> "(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
>
> (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
>
> (ii) Undermining the territorial integrity of a State;
>
> "(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
>
> "(c) Is neither a national nor a resident of the State against which such an act is directed;
>
> "(d) Has not been sent by a State on official duty; and
>
> "(e) Is not a member of the armed forces of the State on whose territory the act is undertaken."

93. It should be noted that for the purposes of the International Convention a serious offence is committed by any person who recruits, uses, finances or trains mercenaries, or attempts to commit such acts or is an accomplice in such acts or attempts.

94. The following States are parties to the International Convention: Azerbaijan, Barbados, Belarus, Cameroon, Croatia, Cyprus, Georgia, Italy, Libyan Arab Jamahiriya, Maldives, Mauritania, Qatar, Saudi Arabia (with reservations to article 17 (1)), Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. A further nine States have signed the International Convention but have yet to ratify it: Angola, Congo, Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania and Yugoslavia.

95. Entry into force of the International Convention will facilitate pre-emptive cooperation among States, clearer identification of situations with a mercenary component, clear identification of the competent jurisdiction in each case, procedures for the extradition of mercenaries and effective trial and punishment of those responsible for the offence.

96. The Special Rapporteur will submit a proposal to the second meeting of experts that it should conduct an exhaustive analysis of the implications of the entry into force of the International Convention so as to be able to offer the Commission, at its fifty-ninth session, in 2003, more specific contributions regarding its content, implementation and impact.

VIII. CONCLUSIONS

97. Commission on Human Rights resolution 2001/3, adopted on 6 April 2001 at its fifty-seventh session, provides confirmation of the concern of the United Nations at the existence of mercenary activities that threaten the right of peoples to self-determination and their effective enjoyment of human rights. The text of the Commission's resolution confirms that such activities are adopting new forms, manifestations and modalities. In turn, the resolution adopted by the General Assembly at its fifty-sixth session confirms the condemnation of mercenary activities in all their modalities.

98. The terms of the renewal of the mandate of the Special Rapporteur on mercenary activities for a period of three years include consideration of cases of the use of mercenaries that threaten the right of peoples to self-determination as well as all new forms adopted to extend mercenary activities. The Special Rapporteur has undertaken his renewed mandate from the standpoint described in the preceding paragraph without prejudice to making respect for self-determination its central thrust.

99. The first meeting of experts convened by the Office of the High Commissioner for Human Rights in compliance with resolutions 54/151 of the General Assembly and 2001/3 of the Commission on Human Rights was a very useful forum for the in-depth study of the use of mercenaries and the serious harm caused to peoples that suffer from it. The final report of the experts (E/CN.4/2001/18, annex) includes substantive aspects relating to the need to develop an updated and satisfactory legal definition of mercenaries. It also contains aspects relating to the various ways in which the use of mercenaries affects self-determination and human rights. In that context, the experts regard mercenary activities as illicit and likely to lead to the violation on a massive scale of human rights among populations affected by such activities.

100. The situation of the peoples of Africa continues to deteriorate as a result of armed conflicts. Possession of natural resources is one of the causes of these conflicts, in which mercenaries are generally involved. This is true of diamonds and oil, which have excited the greed of unscrupulous politicians, traders operating in the global market, adventurers and criminal gangs that enrich themselves by plundering and smuggling gems and precious stones. Mercenaries take part in the plundering and carry out many of the criminal operations.

101. One of the most egregious attempts to exploit the riches of Africa involves UNITA in Angola. This rebel force is the biggest employer of mercenaries. In the territories under its control it extracts and sells unlimited quantities of diamonds, despite the United Nations embargo, and it uses mercenaries to smuggle diamonds to European markets, primarily through Antwerp. The proceeds of the illicit trade enable UNITA to continue the ward that is bleeding Angola dry.

102. Diamonds are also a key factor in the armed conflict in Sierra Leone. Despite the ceasefire, Revolutionary United Front combatants are still armed, still control important diamond-mining areas and still engage in pillaging, terrorist attacks and violations of international humanitarian law. As in other conflicts, mercenaries are involved in the diamond trafficking and the sale of weapons to the Front.

103. In both traditional and new forms of mercenary activity, the recruitment and hiring of mercenaries are facilitated by deficiencies in legal definitions. At the international level article 47 of Additional Protocol I of 1977 to the Geneva Conventions has proved inadequate. In turn, national legislation generally lacks provisions prohibiting mercenary activity.

104. The need to act more effectively against mercenary activities makes it advisable to determine when mercenaries are involved in connection with criminal activities that violate human rights and the rules of international humanitarian law. The United Nations should devote resources to study and analysis of the various means of using mercenaries and of their activities and of those who employ them, acknowledging that together with the legal definition of a mercenary there will be a need to establish legal definitions of crimes and punish those actions in which a mercenary component characterizes and defines criminal activity.

105. Mercenary activity often comes about as the result of a conspiracy to commit such crimes as trafficking in persons, precious stones, drugs and weapons. Some armed conflicts have erupted because there exist markets in weapons to fuel them. Others have been unnecessarily protracted for the same reason. Mercenaries are actively involved both in arms trafficking and in training others in the use of the weapons sold.

106. The terrorist violence of 11 September 2001 against facilities and human life in New York, Washington and Pennsylvania not only merits the most vigorous condemnation but demonstrates that despite the many international instruments against terrorism, this scourge has

grown in its capacity to destroy and violate human rights. Regrettably, the possibility that mercenaries, hired especially for their professional skills, may be recruited in criminal acts in preparation for or execution of a terrorist attack cannot be excluded. Accordingly the connection between terrorist attacks and mercenaries must never be excluded a priori.

107. The need to combat terrorism more effectively makes advisable closer cooperation between States and establishment of coordination mechanisms such as those contained in Security Council resolution 1373 (2001). The resolution refers to elements of terrorist activity which are linked to mercenarism in the sense that the latter may increase the capacity of terrorists to kill.

108. The first meeting of experts on mercenary activities made important contributions towards a better legal definition of the subject. Among those contributions was the notion that the terms to be defined should comprise not only the mercenary as an individual, but also mercenarism, a broader concept encompassing the responsibilities of the States and organizations concerned in mercenary activities. Such activities may be a factor in either international or internal conflicts; their scope is broad and can affect self-determination and human rights in a variety of ways. Lastly, a mercenary may be characterized as a person knowledgeable in military matters or in the use of firearms who places that knowledge and experience at the service of a third party who hires the person to undermine the exercise of self-determination in a given State, destabilize its legitimate government, destroy infrastructure or harm persons through acts of terrorism, and possibly to participate in illicit trafficking. The distinguishing factor is payment, which defines the nature of the act. A mercenary is a criminal agent who is paid to commit crimes and undermine human rights.

109. Although up to now the tendency has been to assume that an individual must be a national of a country other than that in which he or she is operating in order to be considered a mercenary, that notion is currently under review. It is felt that the nationality requirement should be set aside when it is clear that nationals are being paid to act against their own country, with the result that those who are, in fact, acting as mercenaries, avoid being labelled as such.

110. The International Convention against mercenary activities has entered into force, and has been signed by 22 States. It should in principle facilitate pre-emptive cooperation among States and lead to more effective results in eliminating mercenary activities. It would, in any event, be desirable for a larger number of States to accede to it.

IX. RECOMMENDATIONS

111. In view of the advances and proposals that emerged from the first meeting of experts on mercenary activities, it is recommended that the Commission on Human Rights, together with the General Assembly in its resolution, reiterate the need for the Office of the United Nations

High Commissioner for Human Rights to convene the second expert meeting pursuant to General Assembly resolution 54/151, so that the experts can deepen their analysis and formulate specific proposals for a legal definition of mercenaries and other related matters.

112. In view of the text of Commission on Human Rights resolution 2001/3, it is recommended that the Special Rapporteur should continue to study mercenary activities as a means of impeding the exercise of the right of peoples to self-determination but should also take into account other situations in which mercenaries are involved, including illicit trafficking, terrorism, the use of mercenaries by private security companies to intervene in the internal affairs of States and organized crime.

113. It is recommended that the Commission on Human Rights should reaffirm its full support for the self-determination of the African peoples and their right to live in peace, to benefit from the development that can result from the rational use of their own natural resources and to have their legitimate governments recognized, respected and stable, and in that regard it should condemn the mercenary activities frequently organized with the aim of undermining the rights of the African peoples.

114. It is also recommended that the Commission on Human Rights should contact States in which diamond-mining companies, diamond exchanges and associations of diamond merchants operate to seek their active cooperation against illegal trafficking in diamonds and other precious stones in connection with which unscrupulous business practices are employed in the exploitation and sale of diamonds. This illicit traffic is responsible for the persistence of armed conflicts in Africa, with consequent violations of human rights and international humanitarian law. It is well known that mercenaries are involved in the illicit activities carried out by such firms.

115. It is recommended that, together with condemnation of terrorism and efforts to eliminate it, attention should be paid to the need to investigate and follow up on possible connections with mercenaries in the preparation and execution of terrorist acts. This should be done in both United Nations resolutions and in government and legislative acts by States parties so as to improve the effectiveness of pre-emptive action and punishment of terrorists and those associated with them in any capacity in the planning, preparation and execution of terrorist acts.

116. In view of the imperative need in the interest of human security to eradicate terrorism in all its manifestations it is recommended that implementation of Security Council resolution 1373 (2001) should include aspects relating to possible connections between mercenaries and terrorism, as well as to covert operations and secret activities by intelligence services which might contract mercenaries to commit acts which may be assimilated to terrorist acts.

117. In view of the many ways in which mercenaries are used in unlawful acts, it is recommended that special attention should be paid to combating their involvement in illicit arms trafficking, which serves to fuel and prolong armed conflicts. With his experience the mercenary

agent enhances the frequency and volume of illicit arms deals. That being the case, more effort must be put into development legal instruments to facilitate prosecution of that crime and into mobilizing the political will of States to suppress that illicit traffic effectively.

118. In view of the changes in the role of mercenaries and the progress made towards a legal definition of a mercenary, it is recommended that the Commission on Human Rights should instruct the Special Rapportuer, with the support of the second expert meeting, to propose a new definition, relating both to the mercenary and to the more complex phenomenon of mercenarism. The proposal should include a clear nationality criterion and a suggestion on the procedure to be followed for international adoption of a new definition.

119. In view of the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries it is recommended that an effort be made to significantly increase the number of Member States which have ratified or acceded. That would facilitate the banning of such activities and create an international climate more favourable to self-determination and defence of human rights.